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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 99

ILLINOIS STEEL COMPANY, *Petitioner*,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Respondent*

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

BRIEF FOR RESPONDENT.

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OPINION BELOW.

The unanimous opinion of the Appellate Court of Illinois, First District, is reported at 316 Ill. App. 516; 46 N. E. 2d 144.

JURISDICTION.

The jurisdiction of this Court is invoked by petitioner under Sections 237(b) and 240(a) of the Judicial Code, as amended (28 U. S. C. A. 344, 350).

QUESTION PRESENTED.

In a suit by a carrier against a shipper (consignor) to collect a balance of freight charges, where the shipper (consignor) stipulated on the bill of lading issued at the

time the shipment was received by the carrier that the freight charges on the shipment were to be prepaid by him and where he prepaid the freight charges then applicable, is the carrier barred from recovering additional freight charges from the shipper (consignor) by the fact that the shipper (consignor) also signed the so-called "no recourse" provision on the bill of lading, which reads:

> "If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
>
> "The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of Conditions.)"

STATEMENT OF THE CASE.

This case was tried upon a stipulation of facts (R. 11-16) and is an action at law brought by respondent (railroad) to recover of petitioner (shipper) a balance of freight charges due on a number of shipments of sulphate of ammonia delivered by petitioner as shipper and consignor to the Elgin, Joliet and Eastern Railway at Gary, Indiana, consigned to the Standard Wholesale Phosphate & Acid Works, Inc., at Baltimore, Maryland, and transported by that railroad and by respondent. The shipments involved here were made under uniform straight bills of lading in the form prescribed by the Interstate Commerce Commission (R. 11-13).

On each of the bills of lading issued upon the shipments petitioner declared that the shipment was for export and that the freight charges thereon were to be prepaid, and petitioner prepaid to the Elgin, Joliet and Eastern Railway the freight charges on each shipment from Gary to Baltimore at the export rate (R. 13, 15). At the time the shipments moved, and also today, there were two freight rates applicable to the shipment of sulphate of ammonia from Gary to Baltimore, dependent upon whether

the shipment was for export or for domestic use. The rate on a shipment for export was and is lower than the rate on a shipment for domestic use (R. 12).

When the shipments arrived at Baltimore they were delivered by respondent to the designated consignee at the destination specified in the bills of lading. However, after delivery had been made and the shipments had passed beyond respondent's control, the consignee handled each shipment in a manner which violated the tariff requirement as to the application of the export rate. Respondent thereupon demanded that petitioner pay the domestic rate on the said shipments (R. 15-16). Upon petitioner's refusal to pay, this suit was brought for the difference between the total freight charges on the said shipments at the domestic rate and the total freight charges prepaid by the petitioner on the shipments at the export rate.

In the stipulation entered into between respondent and petitioner it is agreed that the determination of this suit shall turn upon the effect of certain instructions incorporated by petitioner into each bill of lading contract (R. 16).

One of the instructions in question appeared in the following provision which was contained in each of the bills of lading under which these shipments moved:

> "If charges are to be prepaid, write or stamp here 'To be Prepaid'."

The words "To be Prepaid" were inserted by petitioner in the space provided at the time of the making of each bill of lading contract and the charges on each shipment were prepaid by petitioner to the Elgin, Joliet & Eastern Railway at the export rate (R. 13).

Each of the bills of lading had this further provision which was signed by petitioner (R. 13):

> "If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
>
> "The carrier shall not make delivery of this ship-

ment without payment of freight and all other lawful charges. (See Section 7 of Conditions.)"

Section 7 of the conditions of the bill of lading, in so far as that section is here relevant, is as follows (R. 14):

> "Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates by signature, in the space provided for that purpose on the face of this bill of lading, that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. * * * Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. * * *

The only question in this case is whether the provisions of Section 7 release petitioner (consignor) from liability for the additional freight charges admittedly due on the said shipments in the face of petitioner's express undertaking as to each shipment that the lawful freight charges thereon were to be prepaid by petitioner.

In the stipulation entered into between respondent and petitioner it is agreed that if the Court shall find that Section 7 of the conditions of the bill of lading is not a bar to recovery by respondent from petitioner, then respondent is entitled to recover the sum of $3,675.52, being the amount due on the shipments delivered to the consignee within three years prior to the institution of this suit; and that if the Court shall find that Section 7 of the conditions of the bill of lading is a bar to recovery by respondent from petitioner, then respondent is not entitled to recover (R. 16).

SUMMARY OF ARGUMENT.

Petitioner expressly contracted to prepay the freight charges on each of the shipments involved here. Since the amount of the freight charges payable on a shipment is fixed by law, petitioner's contract for prepayment was a contract to pay whatever freight charges were legally payable on the shipment. The freight charges legally payable on the shipments involved here were charges computed upon the basis of the domestic rate from Gary to Baltimore and the fact that petitioner invoked as to each shipment the "no recourse" provisions of Section 7 of the bill of lading is no bar to the recovery from petitioner of the balance between such charges and the charges prepaid, since the "no recourse" provisions of that section are not applicable when the shipper has contracted to prepay the freight charges on a shipment.

ARGUMENT.

There is no dispute as to the rate legally applicable to the shipments in question or as to the correctness of the amount which respondent seeks to recover. For the parties have stipulated that the shipments were subject to the domestic rate from Gary to Baltimore and that the amount sued for correctly states the difference between the charges calculated at the domestic rate and the charges prepaid at the export rate. And it is further stipulated that this amount is due respondent. Petitioner's sole defense to the suit is the fact that, although it expressly contracted to prepay the freight charges on each shipment, it at the same time invoked the "no recourse" provisions of Section 7 of the bill of lading (R. 16).

Before considering petitioner's defense we will briefly review certain established principles which run counter to it.

I. THE CARRIER CAN REQUIRE THAT THE FREIGHT CHARGES BE PREPAID BY THE SHIPPER OR CONSIGNOR.

While the Interstate Commerce Act requires a carrier to collect the full amount of the freight charges, the Act is not concerned with who makes the payment and leaves the carrier free to enter into any contract it may see fit with reference thereto, so long as no unlawful discrimination results. Ordinarily, the shipper or consignor, having ordered the transportation, is primarily liable for the freight charges and the carrier has the right to make the liability absolute by requiring that the charges be prepaid. As the Commission said in the case entitled *In the Matter of Bills of Lading*, 52 I. C. C. 671, 721:

> "A primary right of the carrier in the conduct of its business is that of reasonable compensation for the service rendered by it, and it is entitled to assure itself of such compensation by demanding it in advance."

The matter of liability for freight charges is fully covered in *Louisville & Nashville Railroad Company* vs. *Central Iron & Coal Company*, 265 U. S. 59, where Mr. Justice BRANDEIS, speaking for the Court, said (66, 67):

> "* * * As to these matters carrier and shipper were left free to contract, subject to the rule which prohibits discrimination. The carrier was at liberty to require prepayment of freight charges, or to permit that payment to be deferred until the goods reached the end of the transportation. *Wadley Southern R. Co.* vs. *Georgia*, 235 U. S. 651, 656. Where payment is to be deferred, the carrier may require that it be made before delivery of the goods, or concurrently with the delivery, or may permit it to be made later. * * *
>
> "To ascertain what contract was entered into we look primarily to the bills of lading, bearing in mind that the instrument serves both as a receipt and as a contract."

Looking to the bills of lading covering the shipments involved here, we find that in each instance petitioner expressly contracted to prepay the freight charges (R. 13).

II. SINCE THE AMOUNT OF THE FREIGHT CHARGES PAYABLE ON A SHIPMENT IS FIXED BY LAW, AN UNDERTAKING TO PREPAY THE FREIGHT CHARGES IS AN UNDERTAKING TO PAY WHATEVER FREIGHT CHARGES ARE LEGALLY PAYABLE ON THE SHIPMENT.

The courts have uniformly held that it is the duty of the carrier to collect its lawful charges and that the amount of those charges is determined by applying to each shipment the rates and regulations applicable thereto, as stated in the tariff filed by the carrier with the Interstate Commerce Commission. These principles are summarized in the *Central Iron case, supra*, where Mr. Justice BRANDEIS said (65):

> "The shipment being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The amount of the freight charges legally payable was determined by applying this tariff rate to the actual weight. Thus they were fixed by law. No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who had assumed an obligation to pay the charges."

Consequently, wherever the bill of lading contract refers to the carrier's "charges" the term embraces all the freight charges applicable on the shipment under the filed tariffs; and when the shipper or consignor contracts to pay the carrier's "charges," as petitioner did in the instant case, the contract is to pay whatever freight charges are legally payable on the shipment. The stipulation of facts provides here that the freight charges payable on the shipments involved are the charges on which this suit is based; namely, charges computed upon the domestic rate from Gary to Baltimore (R. 16).

In this connection the Appellate Court held (R. 54):

> "* * * When a shipper is required to prepay the charges, that means he is to pay all of the charges applicable to the merchandise being moved. The initial carrier required defendant to prepay the charges. In our opinion the charges which defendant agreed to pay were whatever charges were applicable to the commodity."

III. BY STIPULATING IN EACH BILL OF LADING THAT THE FREIGHT CHARGES ON THE SHIPMENT WERE TO BE PREPAID, PETITIONER CONTRACTED TO PAY WHATEVER FREIGHT CHARGES WERE LEGALLY APPLICABLE ON THE SHIPMENT AND THE FACT THAT PETITIONER ALSO SIGNED THE SO-CALLED "NO RECOURSE" CLAUSE IN THE BILL OF LADING IS NOT A BAR TO RECOVERY BY RESPONDENT FROM PETITIONER.

We have heretofore shown that petitioner expressly contracted to prepay the freight charges on each shipment and that each such contract was an undertaking by petitioner to pay whatever freight charges were legally payable on the shipment. And we have further shown that the only defense interposed by petitioner to this suit for the balance between the charges legally payable on the shipments and the charges computed at the export rate is the fact that petitioner invoked as to each shipment the "no recourse" provisions of Section 7 of the bill of lading.

Briefly stated, respondent's answer is that the "no recourse" provisions of Section 7 are not applicable in instances where, as here, the shipper expressly contracted to prepay the carriers' charges, and that the said provisions relate only to "collect" shipments where the bill of lading contract defers payment of the freight charges until the goods have reached the end of the transportation.

The pertinent portion of Section 7 of the bill of lading reads:

> "Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accru-

> ing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates by signature, in the space provided for that purpose on the face of this bill of lading, that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. * * * Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. * * * ."

We respectfully submit that the wording of Section 7 requires the conclusion that the "no recourse" provisions therein do not apply to prepaid shipments. Thus, the second sentence in the section provides that "The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates by signature, in the space provided for that purpose on the face of this bill of lading, that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges." The fact that these provisions are necessarily repugnant to an undertaking by the shipper to prepay whatever charges are payable is aptly shown by the Appellate Court in its decision, on rehearing, in the present case (R. 55):

> "There were no additional charges due up to the time of delivery. We agree with the plaintiff (respondent) that it would be unreasonable to expect that plaintiff should have anticipated that the consignee would not comply with the export tariff and should have withheld delivery, although the freight charges had been paid."

The court's conclusion is plainly correct. For if the "consignor shall be liable for the freight and all other lawful charges" and he expressly contracts to prepay the freight and all other lawful charges, what possible application can the "no recourse" clause have to such a transaction? How, if the freight and all other lawful charges have been prepaid by the shipper, could the carrier satisfy the provision that it "shall not make delivery without requiring payment of such charges?" The charges having been prepaid, the consignee can demand that delivery be made without more ado. Certainly the carrier could not be expected to forsee that additional charges would become payable because of the consignee's handling of the shipments in a manner contrary to the tariff requirement as to the application of the export rate. When petitioner did not know what the consignee would do with the shipments, how was respondent to know?

Further confirming our position that the "no recourse" clause has no application to prepaid shipments. Section 7 concludes with this provision:

> "* * * Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges."

This assertion of the carriers' acknowledged right is clear and precise, but the provision becomes meaningless if the shipper could limit that right by invoking the "no recourse" provisions of the section. Manifestly any such construction would override the declared intent of Section 7 and the Appellate Court properly so held, saying (R. 53):

> "* * * It is evident that the language 'nothing herein shall limit the right of the carrier to require at time of shipping the prepayment or guarantee of the charges,' limits the right of the shipper in the exercise of the privilege granted by the 'no recourse' clause. It is obvious that if nothing shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges, the 'no recourse'

clause could not be construed as giving the shipper the right to deprive the carrier of its charges."

We will not prolong this discussion of the effect of the provisions of the section since the court below considered that issue fully and with great care. This is apparent from the two opinions delivered herein (R. 22-35, 38-56), the case having been reheard (R. 37) in response to a petition based by the instant petitioner upon the decision in *Chicago Great Western Railway Co.* vs. *Hopkins et al.*, 48 F. Supp. 60, which is the case on which petitioner again relies. In both of the opinions below of Mr. Justice BURKE, in which Justices HEBEL and KILEY concurred, the court holds that the "no recourse" provisions in the bill of lading are not applicable to the shipments involved here for the reason that the shipper had expressly contracted as to each shipment to pay whatever charges were payable thereon. Thus, the court said on rehearing (R. 52-54):

> "Section 7 of the Conditions of the Bills of Lading provides that the consignor 'shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges, and if the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges.' Further along in Section 7 appears the following: 'Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges.'. It is clear that in the bill of lading the carrier reserves the right to demand prepayment of its charges. Having this right, it follows that the shipper is obligated to pay such charges where the demand is made. Each bill of lading carried the provision signed by the shipper that 'the carrier shall not make delivery of this shipment without payment of freight or all other lawful charges.' It is evident that the language 'noth-

ing herein shall limit the right of the carrier to require at time of shipping the prepayment or guarantee of the charges,' limits the right of the shipper in the exercise of the privilege granted by the 'no recourse' clause. It is obvious that if nothing shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges, the 'no recourse' clause could not be construed as giving the shipper the right to deprive the carrier of its charges. In the *Central Iron Company* case the Supreme Court pointed out that the carrier was at liberty to require prepayment of the freight charges. Our inquiry then should be directed to ascertaining whether the carrier did exercise its right to require at the time of each shipment the prepayment of the charges. It will be observed that each of the bills of lading contains the following: 'If charges are to be prepaid, write or stamp here "To Be Prepaid."' The words 'To Be Prepaid' were inserted by the defendant in the space provided at the time of making each bill of lading. The parties stipulated that at the time of making each shipment the initial carrier demanded the freight thereon in the amount set forth under the heading: 'Amounts paid by defendant' in Exhibit 'A' of the amended complaint, and that the defendant prepaid said amounts to the initial carrier as required by the bill of lading, and that the initial carrier transported each of the shipments to Curtis, Indiana, and there delivered each of the shipments to the plaintiff. The stipulation further provides that 'the total freight charges at the export rate on the shipments delivered within three years prior to the institution of this suit was $9,801.93, which charges the defendant prepaid on said shipments; that the total freight charges on said shipments at the domestic rate was $13,477.45, a difference of $3,675.52.' This sum of $3,675.52 is the difference between the export rate and the domestic rate. No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who has assumed an obligation to pay the charges. The initial carrier insisted on the payment of the charges. This carrier did not demand

payment of part of the charges. It did not demand payment of charges on account. The initial carrier could not demand payment of the domestic rate until it appeared that the shipments would not take the export rate. Each bill of lading recited that the merchandise was 'for export,' and that the freight rate was prepaid at 28¢ per 100 pounds to Baltimore. The parties knew that this was the export rate. It is plain that the initial carrier was demanding and the shipper was prepaying the charges, and that each understood that the export rate was applicable. Following the direction of the bill of lading that 'if the charges are to be prepaid, write or stamp here "To Be Prepaid,"' the words 'To Be Prepaid' were inserted by the defendant in the space provided at the time of making each such shipment.

"We are satisfied that when the initial carrier demands that the charges be prepaid, which it has a clear right to do, that the 'no recourse' clause is not applicable. Defendant points out that the shipper has the right to prepay any part or all of the charges if he wishes, and that it is a common practice for the consignor to prepay part of the charges and for the carrier to collect the remainder of the charges from the consignee. Nevertheless, the carrier can insist upon its right to require prepayment of its charges. Where a carrier accepts part payment of its charges from the consignor, that, of course, would not be a prepayment. At most it would be a prepayment of part of the charges. In a case where the railroad company accepted part payment of the charges and the shipper signed the 'no recourse' stipulation, we are of the opinion that this stipulation would be effective to protect the shipper as to the balance of the charges. In such a situation it is manifest that the carrier would not be demanding prepayment of its charges. It would be a contradiction to say that the railroad company insisted on the charges being prepaid and that the shipper could not be required to pay any deficiency if the proper charges were not collected. When a shipper is required to prepay the charges, that means he is to pay all of the charges applicable to the merchandise being moved. The initial

carrier required defendant to prepay the charges. In our opinion the charges which defendant agreed to pay were whatever charges were applicable to the commodity. We are of the opinion that the 'no recourse' clause is not applicable to the situation covered by the stipulation."

And further (R. 55-56):

"While it is true that the commodity shipped was Sulphate of Ammonia and that Sulphate of Ammonia was shipped, the export rate was applied on the assumption that the handling of each shipment would be in accordance with the tariff regulation. Plaintiff had no control over the handling of each shipment after it was delivered to the consignee at Baltimore. Defendant, in selling its product, had the opportunity to contract with the purchaser so as to protect itself by requiring that each shipment be handled so that the export rate would be applicable. Defendant states that it prepaid the charges on the shipment at the export rate and that it had no way of knowing what might happen to the shipment after delivery at Baltimore. Plaintiff points out that if the defendant did not know what the consignee might do with the shipment, how was it (plaintiff) to know? The shipping instructions from the defendant directed that delivery be made to the Wholesale Phosphate & Acid Works, Curtis Bay, Baltimore, Maryland, for export. These instructions were carried out and delivery made as directed. There were no additional charges due up to the time of delivery. We agree with the plaintiff that it would be unreasonable to expect that plaintiff should have anticipated that the consignee might not comply with the export tariff and should have withheld delivery, although the freight charges had been paid. Plaintiff required the payment of its charges at the time of shipment. At that time the defendant designated the shipments as for export and defendant prepaid the charges at the export rate. A subsequent examination as to the handling of the shipments revealed that the export rate was not applicable.

A fundamental error in defendant's reasoning is that it fails to appreciate that the carrier has the right to insist upon the prepayment or guarantee of the charges, for by the express terms of Section 7 of the Conditions of the Bills of Lading, nothing therein 'shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges.'

"Where the carrier manifests an intention to demand prepayment of the charges the signing of the 'no recourse' stipulation by the shipper is ineffective. Defendant suggests that if it had been the intention of the framers of the Uniform Bill of Lading to make the 'no recourse' clause inapplicable to shipments marked 'To Be Prepaid,' they would have expressly provided in Section 7 that the 'no recourse' clause should not apply in cases where the prepaid clause of the bill of lading has been executed. Defendant insists that both the 'prepaid' and 'no recourse' clauses can be given effect and that the court should construe the bill of lading contract so as to give effect to all of its provisions. The law requires a shipper to pay all of the charges in advance if demand therefor is made by the carrier. Delivery of the shipment does not change the primary obligation of the shipper to pay the charges. Where the carrier insists on prepayment of the charges the shipper cannot, by signing the 'no recourse' stipulation, avoid its obligation to pay all of the charges, and if through some mistake all of the charges are not collected in advance, the liability of the shipper to pay persists. Counsel for the defendant submitted to us a copy of the opinion filed November 10, 1942, in the United States District Court for the District of Minnesota, Fourth Division, in the case of *Chicago Great Western Railway Co.* vs. *Hopkins et al.*, No. 497 Civil. While this opinion is in point on the issues before us, we do not agree with the reasoning or the result."

As we have said, the decision on rehearing in the instant case was rendered after the opinion in the *Chicago Great Western* case had been carefully considered by the court below in response to the petition filed by the instant peti-

tioner. The court states that it does not agree with the reasoning or the result in the *Chicago Great Western case* and we respectfully submit that this conclusion is fully warranted. For Judge NORDBYE there reasons (48 F. Supp. 60, 61) that Section 7 of the terms and conditions of the bill of lading is not pertinent to the determination of the effect of a stipulation on the bill of lading, even though the stipulation was expressly made subject to those terms and conditions and commenced with the words "subject to Section 7 of Conditions." And, applying this reasoning, the opinion completely ignores the provision in Section 7 that "nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges."

The opinion continues (62):

> "Presumably, a consignor could arrange with a carrier to pay part of the freight charges, and then by signing the 'no recourse' proviso secure exemption from the balance or any additional lawful charges. In fact, this arrangement is tacitly recognized by the form of receipt which will be found on the face of the uniform bill of lading, which reads as follows:
>
> 'Received $..... to apply in prepayment of charges on the property described hereon.
>
> .....
> Agent or Cashier
>
> 'Per .....
>
> '(The signature here acknowledges only the amount prepaid).'"

Although this receipt and the part-payment arrangement recognized by it are separate and apart from the proviso in the bill of lading as to the prepayment of freight charges, the opinion reads the part-payment arrangement into the prepayment proviso and thereby reduces the shipper's undertaking from an express agreement to prepay the

lawful charges on the shipment to an agreement to pay a certain amount to be applied against the charges.

In its petition for writ of certiorari petitioner seeks to lay the foundation for the same line of reasoning in the instant case. For petitioner there asserts (13) that there was prepayment of *part* of the charges on each of the shipments involved here and that each bill of lading contained the above-quoted receipt *signed by the initial carrier.* However, these assertions are not in accord with the facts. For the stipulation of facts (R. 11-16) does not recite that the receipt was signed by the initial carrier or by any other carrier. On the contrary, it clearly appears (R. 14) that the receipt was not signed by anyone. As to petitioner's assertion that there was only prepayment of "part" of the charges on each shipment, the Appellate Court correctly found (R. 53-54):

> "The initial carrier insisted on the payment of the charges. This carrier did not demand payment of part of the charges. It did not demand payment of charges on account."

Finally, the holding in the *Chicago Great Western* case is contrary to the holding of the District Court for the Western District of Pennsylvania in the case of *New York Cent. R. Co.* vs. *Union Oil Company*, 53 Fed. (2d) 1066. For the very same question was considered there and the court held, as did the Appellate Court in the present case, that the shipper of a prepay shipment was not relieved from liability for the excess of the legal freight charges over the amount collected by his having signed the "no recourse" stipulation of Section 7 of the bill of lading, saying (1067):

> "* * * The questions are as follows:
>
> "1. Where a carrier furnishes a consignor with a written rate quotation which is less than the published tariff rate, and on the basis of such quotation accepts and delivers to the consignee a prepaid shipment under a bill of lading which provides by signed stipulation that there shall be no recourse on the consignor if

delivery is made without collecting from the consignee all freight and lawful charges, may the carrier, who through error has failed to collect the undercharge from the consignee, compel the consignor to pay the difference between the rate prepaid and the published tariff rate?

* * * * * * *

"Our answer to each question is in the affirmative, in so far as the questions apply to the facts of the instant case. The consignor was the owner of the goods shipped and the transportation ordered was on its own behalf. Under such circumstances, the consignor is primarily liable even where the bill of lading contains a provision imposing liability upon the consignee. *Louisville & N. R. R. Co.* vs. *Central Iron & Coal Co.*, 265 U. S. 59, 44 S. Ct. 441, 68 L. Ed. 900. * * *

"In the instant case no doubt can exist, we think, as to the liability of the shipper. As to eight of the shipments, it is plain that the consignor, by the bill of lading, contracted to pay the freight charges." * * *

To the same effect is the decision in *Chesapeake & Ohio Ry. Co.* vs. *Glogora Coal Co.*, 113 W. Va. 796 (certiorari denied by U. S. Supreme Court, 290 U. S. 658), where the court likewise held that the execution of the stipulation under Section 7 of the bill of lading does not relieve the shipper or consignor of liability for the payment of the proper freight charges on prepay shipments. In disposing of the contention of the Coal Company that it had executed the "no recourse" clause of Section 7 of the bill of lading and consequently could not be held liable for any freight charges, the court held (799):

"* * * we are of opinion that in determining whether there was primary obligation upon the consignor to pay the freight, controlling effect must be given to the above mentioned requirement of the published tariff that freight charges on shipments to a nonagency station should be prepaid.

"To the suggestion of the consignor that the require-

ment of the tariff for prepayment of freight is indefinite and does not place any greater liability on the consignor than it does on the consignee for such prepayment, the reply seems obvious that the party who procures the services of a carrier to transport freight to a prepay station does so on the basis of statutory requirements. The primary obligation logically rests upon him who procures the service to be performed, especially where it does not appear that he was procuring the service for and on behalf of some other person. No contract entered into at the time of shipment can alter requirements of the law."

We therefore submit that the decision of the Appellate Court in the case at bar is correct and accords with the principles applied by this Court and by other courts, both state and federal.

(a) There is No Foundation for Petitioner's Suggestion that Respondent Knew, or Should Have Known, at the Time of Delivery that the Consignee Would Handle the Shipments in a Way Which Would Make the Export Rate Inapplicable.

At page 12 of its petition for writ of certiorari, petitioner argues that the place where respondent delivered the shipments in issue made the export tariff inapplicable and that respondent knew or should have known that it was not making the deliveries required by the export tariff. This argument disregards the established fact that a carrier is required to make delivery in accordance with the instructions of the bills of lading; it has no control over the actions of the consignee. On the shipments in question the bills of lading specified (R. 43):

"Consigned to Standard Wholesale Phosphate & Acid Works, Inc. Destination—Curtis Bay—Baltimore, State of Maryland. Route—E. J. & E., Curtis, B&O—for export."

Respondent was required to follow these shipping direc-

tions; it had no power or right to withhold the shipments in anticipation that the consignee might not handle them in accordance with the export tariff. Its directions were to deliver to Standard Wholesale Phosphate & Acid Works, Inc., Curtis Bay, Baltimore, Maryland. These directions were followed. The fact that the shipments were delivered at buildings used by consignee for storing, mixing and bagging commodities moving in both domestic and export commerce does not afford any warrant for petitioner's claim that the railroad was charged with knowledge that the domestic rate would be applicable. For the stipulation of facts expressly provides (R. 12-13) that the buildings in question "branch onto or abut wharves at which steamers are berthed for receiving and discharging cargoes" and finally that the shipments were actually loaded into steamers alongside these wharves. The instructions to deliver at the buildings therefore indicated, at least as forcibly, that the consignee intended to handle the shipments directly through the buildings, across the wharves and into the steamers berthed thereat. Indeed, such would be the natural and proper assumption from the fact that the shipments were billed for export and storing, bagging and mixing were not authorized under the tariffs naming the export rate.

As the court below said (R. 55):

> "* * * There were no additional charges due up to the time of delivery. We agree with the plaintiff (respondent) that it would be unreasonable to expect that plaintiff should have anticipated that the consignee would not comply with the export tariff and should have withheld delivery, although the freight charges had been paid."

CONCLUSION.

It is submitted that petitioner, having contracted to prepay the freight charges legally payable on the shipments involved, is liable to respondent for the balance of freight charges admittedly due and that the "no recourse" provisions of the bill of lading, invoked by petitioner, have no application here and are not a bar to recovery. We therefore submit that the judgment of the Appellate Court of Illinois in this case should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 99.—October Term, 1943.

Illinois Steel Company, Petitioner, *vs.* Baltimore and Ohio Railroad Company. } On Writ of Certiorari to the Appellate Court of the State of Illinois, First District.

[January 3, 1944.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Decision in this case turns on the proper interpretation to be given to several clauses of the uniform bill of lading approved by the Interstate Commerce Commission as authorized by §§ 1(6), 12 and 15(1) of the Interstate Commerce Act, as amended, 49 U. S. C. §§ 1(6), 12, 15(1), which make it the duty of interstate rail carriers to adopt and observe the form and substance of bills of lading approved by the Commission. *Matter of Bills of Lading*, 52 I. C. C. 671, 685, 686; 64 I. C. C. 347, 351-352; 64 I. C. C. 357; 66 I. C. C. 63; 167 I. C. C. 214; 172 I. C. C. 362; 245 I. C. C. 527.

Petitioner was the consignor upon through bills of lading of a number of rail shipments of sulphate of ammonia for export. The shipments were from Gary, Indiana to Baltimore, Maryland over the lines of connecting railroads, of which respondent was the terminal carrier. Each bill of lading[1] contained a clause, inserted by petitioner, the consignor, in conformity to instructions appearing on the bill, and providing that freight was "to be prepaid"; and also the so-called non-recourse clause which petitioner signed and which read: "If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of conditions.)"[2]

[1] Specimen forms of the uniform bills of lading, prescribed for interstate rail shipments during the period when the shipments concerned in this action were made, may be found in Consolidated Freight Classification No. 7 (1932) pp. 52-56.

[2] § 7 of the conditions of the bill of lading, so far as relevant, is set out at pages 3-4, *infra*. The parties have stipulated that the non-recourse clause contained in the bills of lading in this case were in the form quoted in the text. The form approved by the Commission varies slightly in details immaterial here. See Consolidated Freight Classification No. 7, *supra*, p. 52.

Petitioner at shipment paid the freight charges specified in the bills of lading, which were computed at the export freight rate. The bills of lading included a receipt for specified sums paid to the carrier "to apply in prepayment of the charges". The record does not disclose who was the owner of the sulphate, or what further relations existed between consignor and consignee.

The parties concede that upon delivery of the shipments at Baltimore, the consignee did not handle the sulphate as required by the provisions of the export tariff, and that the delivery or the method of handling subjected the shipments to the higher domestic freight rate. The parties have also stipulated that respondent is entitled to recover from petitioner, additional freight charges to the extent of the difference between the export rate and the higher domestic rate, unless recovery is barred by the clauses of the bills of lading to which we have referred.

Respondent brought the present suit in the Illinois Superior Court to recover the additional freight due upon the shipments. The Superior Court gave judgment for petitioner, which the Illinois Appellate Court reversed, 316 Ill. App. 516, and the Illinois Supreme Court denied leave to appeal. We granted certiorari, 320 U. S. —, the interpretation of the uniform bill of lading in the circumstances of this case being a question of public importance.

Pursuant to Congressional authority, the Interstate Commerce Commission has prescribed uniform forms of bills of lading, including that involved in this case. *Matter of Bills of Lading, supra.* In promulgating them, the Commission has stated that it was doing so in the interest of uniformity and to prevent discriminations. 52 I. C. C. 671, 676-677, 678; 64 I. C. C. 357, 363, 364. It has found that the prescribed forms are just and reasonable, 52 I. C. C. 671, 740, and that any other would be unreasonable, 64 I. C. C. 357, 360-361, 364.

The construction of the clauses of a bill of lading, adopted by the Commission and prescribed by Congress for interstate rail shipments, presents a federal question. *Georgia, Fla. & Ala. Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 194-195; *Chesapeake & Ohio Ry. Co.* v. *Martin*, 283 U. S. 209, 212-213. Such has been the consistent ruling of this Court where the question presented concerned the conditions in bills of lading affecting the liability of the carrier such as are required by the Carmack Amendment, as amended, 49 U. S. C. § 20(11). *Georgia, Fla. & Ala. Ry. Co.* v. *Blish Milling*

Co., supra; Atchison, Topeka & S. F. Ry. Co. v. *Harold*, 241 U. S. 371; *St. Louis, Iron Mt. & S. Ry. Co.* v. *Starbird*, 243 U. S. 592; *Gulf, Colo. & S. F. Ry. Co.* v. *Texas Packing Co.*, 244 U. S. 31, 34; *American Ry. Exp. Co.* v. *Lindenburg*, 260 U. S. 584; *Chesapeake & Ohio Ry. Co.* v. *Martin, supra;* cf. *Peyton* v. *Railway Express Agency*, 316 U. S. 350.

Since the clauses of the uniform bill of lading govern the rights of the parties to an interstate shipment and are prescribed by Congress and the Commission in the exercise of the commerce power, they have the force of federal law and questions as to their meaning arise under the laws and Constitution of the United States. Hence we have jurisdiction to review their determination by the state courts, in a suit by the carrier to recover freight charges. Judicial Code § 237(b), 28 U. S. C. § 344(b); *Pittsburgh, Cinc., C. & St. L. Ry. Co.* v. *Fink*, 250 U. S. 577, 581-583; *New York Central & H. R. R. Co.* v. *York & Whitney Co.*, 256 U. S. 406, 408; cf. *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176-177; *Peyton* v. *Railway Express Agency, supra; Southern Ry. Co.* v. *Prescott*, 240 U. S. 632, 639-640.

The shipments by petitioner being in interstate commerce, the rail freight rates are those stated in the tariffs filed with the Interstate Commerce Commission. They cannot be lawfully released by the carrier or altered by others who have assumed the duty to pay them. See *Mid State Horticultural Co., Inc.* v. *Pennsylvania R. R. Co.*, No. 40, decided November 22, 1943; *Pittsburgh, Cinc., C. & St. L. Ry. Co.* v. *Fink, supra*, 581-583. The tariffs do not prescribe who is to pay the freight charges, but subject to the prohibition against unlawful discrimination and the limitations imposed by the uniform bill of lading, the parties to the shipment, as between themselves, are free to stipulate who shall pay them. See *Louisville & N. R. R. Co.* v. *Central Iron Co.*, 265 U. S. 59, 65-67.

Section 7 of the conditions of the uniform bill of lading provides that the owner or consignee shall pay the freight and all other lawful charges upon the transported property, and except in those instances where it may be lawfully authorized to do so, that no railroad carrier shall deliver or relinquish, at destination, possession of the property covered by the bill of lading until all tariff rates and charges have been paid. Cf. § 3(2) of the Interstate Commerce Act, as amended, 49 U. S. C. § 3(2). But it further provides that "The consignor shall be liable for the freight and all

other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided[3]) shall not be liable for such charges. . . . Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. . . ."

Under these provisions, if the non-recourse clause is not signed by the consignor, he remains liable to the carrier for all lawful charges. The carrier is free to demand payment in advance by the consignor, or it may decline to make delivery to the consignee until the freight charges are paid or guaranteed, or if delivery is made to the consignee without payment, the consignee is also liable for all freight charges. But if the non-recourse clause is signed by the consignor and no provision is made for prepayment of freight, delivery of the shipment to the consignee relieves the consignor of liability, see *Louisville & N. R. R. Co.* v. *Central Iron Co.*, *supra*, 66, n. 3, and acceptance of the delivery establishes the liability of the consignee to pay all freight charges. *Pittsburgh, Cinc., C. & St. L. Ry. Co.* v. *Fink*, *supra*; *New York Central & H. R. R. Co.* v. *York & Whitney Co.*, *supra*.

In the light of these long established rules of liability the facts of the present case raise only a single question, whether the stipulation in the bills of lading for the prepayment of freight restricts the operation of the non-recourse clause so that, despite its presence in the bills of lading, recourse may be had to petitioner for charges in addition to those which it prepaid at shipment, the additional charges arising only by reason of events which occurred on or after the delivery of the shipments to the consignee.

The Illinois Appellate Court thought, and respondent argues here, that this liability was imposed on the consignor only because

[3] The exception, inapplicable here, is in the case where a consignee, other than the consignor, is an agent with no beneficial title in the goods, and has notified the carrier of these facts. In such a case the consignee is not "liable for transportation charges . . . (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him," but the consignor is liable for such charges. Cf. § 3(2) of the Interstate Commerce Act, as amended, 49 U. S. C. § 3(2).

the prepayment clause was so in conflict with the non-recourse clause as to nullify the latter and thus revive the obligation which, in the absence of that clause, rests on the consignor to pay all lawful charges on his shipments. The question is whether there is such a conflict as to require this result. For we must assume that both clauses were intended by the parties to have some effect, and hence, unless unavoidably in conflict, they must, so far as they reasonably may, be reconciled so that each will have some scope for operation.

The obvious purpose and effect of the non-recourse clause is to relieve the shipper from liability for freight charges, upon delivery to the consignee. Such a purpose is consistent with an intention that in case of prepayment of a portion of the freight charge, the carrier should, after delivery, look solely to the consignee for the remainder of the charge. Since, by the uniform bill of lading, the parties to a rail shipment are left free to relieve the consignor from liability by their contract, such an arrangement would be within their competence and would release the consignor from liability to the extent of the unpaid freight charges.

It could not be said that by agreeing to pay a part of the charges in advance, the consignor has agreed to pay more, or that the non-recourse clause would cease to be effective as to the unpaid charges because the consignor had paid or undertaken to pay some of them. The words of § 7 of the conditions of the bill of lading are to the effect that if the consignor stipulates that the carrier shall not deliver "without requiring payment of such charges" and the carrier makes delivery, the consignor "shall not be liable for such charges". In this context, "such charges" are the lawful charges which the consignor has not paid or stipulated to pay in advance.

We discern no policy underlying the uniform bill of lading or in the provisions of § 7 which would deny the application of the non-recourse clause where the consignor has stipulated for advance payment of some but less than all of the lawful charges. And no plausible reason is advanced why an agreement by the consignor to pay a part of the lawful charges should be deemed to deprive him of the benefit of the non-recourse clause beyond the amount he has undertaken to pay.

We think that the same considerations point here to the reconciliation of the conflict which the Illinois court thought to exist in this case. For in the present circumstances we cannot say

that the prepayment clause contemplated payment by the consignor of the additional charges demanded at the domestic tariff rate and hence we find no irreconcilable conflict between the prepayment and non-recourse clauses.

Petitioner's stipulation was that the freight charges were "to be prepaid" and the bill of lading acknowledged receipt of specified sums "to apply in prepayment of the charges". Hence the stipulation was for an obligation to be performed in advance of the transportation or at the most in advance of delivery to the consignee. This obligation could not have contemplated payment of more than all the lawful charges upon the consignor's shipment as tendered and transported in conformity to the billing. No more could prepayment be made, before either shipment or delivery, of a charge which might never be incurred, and which could be, only after the transportation was completed and delivery made to the consignee.

It is familiar experience, as in this case, that under-charges may occur which could not be subject to prepayment either because they are not lawful charges on the shipment as tendered and billed, or because they depend upon events occurring after the transportation has been completed. In either case we conclude that the reasonable construction of the prepayment clause is that, with respect to these charges, it did not, either by its design or by the intention of the parties, curtail the operation of the non-recourse clause, so as to deprive petitioner, the consignor, of the immunity from liability for which it was entitled to stipulate by the non-recourse clause. See *Chicago Great Western Ry. Co.* v. *Hopkins*, 48 Fed. Supp. 60. This construction does not leave the carrier unprotected with respect to the collection of unanticipated freight charges, for it may always insure their collection by demanding the consignor's guarantee of all charges, pursuant to § 7 of the conditions of the uniform bill of lading, a provision which presupposes that the prepayment of freight clause is not as broad as the authorized guarantee.

In the special circumstances of this case we have no occasion to consider the broader contention of petitioner that the prepayment clause contemplated an undertaking upon its part to pay only the amount of freight charges specified on the face of the bill of lading, whether or not they were computed at the lawful rate on the shipments as tendered and billed.

Reversed.

Mr. Justice Roberts concurs in the result.